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gates took an active part in the deliberations which resulted in the statute establishing the international court. Just as the Supreme Court of the United States has been the bulwark of the equal rights of all states in the American Union, so we must look to the international tribunal to uphold the equal rights of all states, both great and small, in the Society of Nations. With the principles upon which that Court has been constructed I believe that the people of Canada are in hearty accord.

It may be many years before we see the consummation of the work to which we have set our hands, but we believe that the time will come. If I may borrow a phrase which has been consecrated to the United States from the early days of its history, we look forward to a day when the government of the world shall be "a government of laws and not of men."

# Compulsory Arbitration Not Essential to An Effective World Organization

By GEORGE W. WICKERSHAM
Formerly Attorney General of the United States

THE weak have but one weapon—the administration of justice; the strong have the weapon of force. As the great war proceeded, in the exercise by the great Power which thought its weapon of force was invincible, there came over the consciousness of the world a resolution which, at one time, at least, was profound—that the rule of justice must be extended over the strong as well as the weak. As time went on, and that awful struggle with its chapter of atrocities and horrors swept into its pathway more and more peoples and increasingly destroyed the accumulations of civilization, I take it that resolve deepened. Then the war came to an abrupt end.

Ferdinand Foch some time ago said, justifying the Armistice: "What more can a military commander do than to say to the statesmen, 'Make what peace you will, I will enforce it.'" The task of applying to the world in peace this ideal, this conception of extending the reign of justice over the strong and the weak alike, was devolved upon the statesmen of the world. Have they done their work as well as the soldiers did theirs? It is two years and a half since the Armistice was signed; and the world is still debating how this rule of justice can be attained, and are told, in effect, that this is an illusory dream; that nations will be bound only within the limits of their strength by what they must yield to, and that what little progress we may make must be step by step towards that far-off, unattainable ideal.

Yet to me there is a better ideal. Statesmen had a better conception. I think the League of Nations, which, unfortunately, was made a football of domestic politics, embodied a much better conception, a much more practical conception of the attainment of justice between the nations than that. What did it provide? There were two things—a place where the representatives of the nations of the earth could assemble around a table with the right to discuss questions of an international character; and an agreement by all the parties not to make war against each other until they had either submitted the controversy, which brought them

to the contemplation of war, to arbitration, or to inquiry and report by an impartial tribunal. Everything else was subsidiary to those two attainments. Unfortunately, there were injected into the document some subsidiary provisions which touched on traditional prejudices, traditional ideas, and so were made the foci of opposition to the whole covenant, and led to its rejection by the Government of the United States. Now, after the tumult of election is over, we look upon a world still in disorder and must consider how we can once more take up America's duty of helping to conserve the peace she helped to win in a way to advance the cause of justice among the nations.

As the discussion over the League proceeded, one school of thought objected to the provisions regarding the submission of controversies to decision by arbitration, upon the ground that that was not made the central point of the Covenant; that arbitration was not made compulsory, and that the principles of international law did not constitute the dominant power of the agreement.

Now the effort at international agreement for the submission and disposition of controversies has had a history to which we have contributed a great part, a history which was very greatly ignored by many of those who attacked the Treaty because of what they considered its failure effectively to apply the principle of compulsory arbitration. The United States has been foremost in advocating the general principle of arbitration of international disputes, and yet always the Senate of the United States has refused to commit the government in advance to an agreement to submit to arbitration any question which might arise. Always it was provided in every treaty that, when any particular question came to be submitted, the article of submission, or *compromise* as it is called, should be especially framed to meet the particular case for arbitration submitted for the approval of the United States Senate.

The Hague Conference of 1907 was largely abortive, because the nations would not agree,—the United States least of all,—to a general agreement to submit to arbitration all questions which might arise between nations in the future. They refused to do more than to commit themselves to a general principle of arbitration, specifically providing that, when any particular controversy arose, it should be made the subject of a special agreement, particularly framed and submitted on that occasion for the approval of the governments concerned. The so-called Bryan treaties are merely agreements that, if controversies arise, threatening the peace of nations, between us and some other power, we will submit these controversies to investigation, inquiry and report, without any agreement on our part to be bound by the report, but merely with the agreement that we would not go to war over the controversy until the expiration of a certain time after the report was made.

That was the background; that was the history of the dealings of the United States with the general principles of arbitration, upon which was projected this effort to reach an agreement in the Covenant of the League. Nay, more, when the controversy arose over the passage of the Panama Canal Act in 1913, which undertook to give to American coastwise shipping the right of passage through the Panama Canal without paying tolls, a provision, which was challenged by Senator Root and others as being in direct violation of the Hay-Pauncefote Treaty, and as giving rise, inevitably, to a controversy with Great Britain which must be submitted to arbitration—a bill was intro-

duced which was passed one year later, repealing that Act. Members of the Senate who supported that bill, asserted that it was well known that no treaty to submit that question to arbitration would be ratified by the Senate, because it was perfectly well recognized that, if that question were submitted to arbitration, the decision inevitably would be against the United States.

We must have those facts in mind when we talk about compulsory arbitration now, when there is looming on the horizon another effort, not only to violate the Hay-Pauncefote Treaty to the extent that was done by the Act of 1913, but to extend that violation by exempting from the payment of tolls *all* American shipping of every kind, foreign or coastwise. We must consider in that connection whether the United States desires to go into an arbitration, compulsory or otherwise, in which we have the wrong moral, and as I believe, the wrong legal side of the question.

Now, Professor Scott[1] has outlined very clearly and in a most instructive way, what has been done since the signing of the Treaty of Versailles towards the establishment of that international court which the Covenant provided should be erected. Incidentally, the criticism that it was not embodied in the Covenant itself is answered by the length of time and the extent of the deliberations the great Jurists of the world required to frame the instrument which has now been adopted. He has shown how, when that matter came before the Council, with the recommendation of these Jurists—Mr. Root himself said that they did not expect it would be adopted, but they desired to formulate as their ideal of what should be done, knowing that it would stand as something in a tangible form to be considered and upon which the matured thought of the peoples of the earth would, perhaps, ultimately crystallize. But none of the great powers were willing to agree that that court might issue compulsory process to bring into court one nation at the complaint of another nation. Whether it would or no (and there is nothing in the history of the United States Senate to afford the slightest ground for the belief that the Senate would ratify any treaty which contained such a provision) I hope the day may come when it will. I believe the time will come when public sentiment will compel it though I recognize that that time has not yet been reached.

There are two questions involved in the idea of compulsory arbitration. One is the compulsory bringing before a court of a nation against which a complaint has been lodged, and the other is the compulsory enforcement of the judgment of the court. Both of those ideas are involved in the conception of a court which is going to take the place of all other organs of mediation and determination between nations for the purposes of averting the causes of war.

Now the United States has no higher record, when it comes to conformity with the adverse decrees of a court of arbitral justice, than it has with respect to a general agreement to submit cases to arbitration. Just before the war there was another example of our attitude when something is adjudicated by a court that seems to run counter to our interests. Mr. Root, who has done more to advance the cause of international justice than any one man in our day, and I believe since the days of Grotius, was largely responsible for the creation of a court known as the Central American Court of Justice.

[1] *See* page 100.

It was a tribunal created to decide controversies arising between the five Central American states. It was erected with the blessings of the United States. It was acclaimed at Pan-American gatherings as embodying the great American principles of arbitration. In time a controversy arose between two Central American states over a treaty made between a third and the United States, which the two complaining states contended impaired their sovereignties and sought to deal, without their consent, with their properties. So they, Salvador and Honduras, filed complaints in the Central American court against Nicaragua, and Nicaragua, under the guidance of the United States, whose State Department was then presided over by that apostle of good will among nations, William Jennings Bryan, refused to appear before the bar of the court. The court thereupon proceeded *ex parte* to examine the claims of those two nations and as a result of such investigation made a unanimous award, in which even the Nicaraguan member of the court joined, to the effect that Nicaragua had violated the rights of property and sovereignty of Costa Rica in granting as she had done, certain rights and certain property to the United States. Again, under the backing of the State Department of the United States, Nicaragua defied the court and refused to recognize the award. When the ten-year period, for which the court was created, expired shortly afterwards, its members with great dignity resolved to adjourn *sine die*, because, as the United States had withdrawn its moral support, the court's continued existence had become practically impossible, as it was left incapable of maintaining its international dignity.

Now that is the situation, so far as the United States is concerned, respecting international arbitration. With that background, let us consider for a moment the two questions I noted above. The first is whether such an international arbitral court should have compulsory jurisdiction. The example is cited of the states under the American Constitution. Well, that is a wholly misleading analogy. The Supreme Court of the United States and the other Federal Courts are the creatures of a sovereignty whose laws are superior to those of every state. They operate within their jurisdiction directly upon the citizens of the states. A great crisis in our national life was reached with the pronouncement of the decision of the Supreme Court in the case of *Chisholm* vs. *Georgia*, which gave rise to a famous remark attributed to Thomas Jefferson: "John Marshall has pronounced his judgment, now let John Marshall enforce it." That decision led to the adoption of the Eleventh Amendment to the Constitution of the United States, which withdrew from the jurisdiction of the Supreme Court suits brought by the citizen of a state against another state. It left the court with jurisdiction of a suit by one state of the Union against another. Very recently the Supreme Court has been brought face to face with a situation where a state against which a judgment was pronounced at the suit of another state, showed no readiness to comply with the judgment, and it was only when the court intimated in its opinion that possibly jurisdiction might be found to enforce that decree, which was for the payment of a sum of money, by causing a levy to be made on the property of the citizens of the defendant state to pay the award, that the state discovered any disposition whatever to comply with the award. It might well be that, since a treaty made under the authority of the United States is a

part of the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding, a treaty erecting an international court might provide that the judgments of that court against any nation should be binding upon all the citizens of that or any other nation, in all controversies arising in its courts, and in that way possibly the analogy of the Federal system might be worked out. But at the present time, these proposed treaties deal only with controversies between states as sovereignties, and the analogy of our Federal system to such controversies is a strained and misleading one.

There is a great deal of sense and a great deal of nonsense talked about international courts. Long before controversies reach a point where they form the appropriate consideration of either courts or wars, there is an area of discussion, debate, and misunderstanding that can be removed only by good sense, by the exchange of candid opinion, by having some place where the representatives of the powers concerned may sit down and discuss with each other the merits and demerits of these questions. No convention establishing an international court alone will effectively deal with the fundamental question of providing for the extension of the rule of justice alike over the great and the small nations, and the subordination of the rule of force among the nations of the earth.

# Law the Prerequisite of an International Court

By CHARLES G. FENWICK, PH.D.
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TAKEN in their logical succession, the problem of an international court presents the following questions: First, must the parties to a dispute be compelled to refer the dispute to the court when it can not be settled between them by direct negotiation? In other words, shall the court have compulsory jurisdiction over all disputes which threaten to result in armed conflict, and if so, by what means are the parties to be brought to court? Secondly, what is to be the composition or organization of the court before which the dispute is to be tried? Thirdly, what law is to be applied to the settlement of the case? And, fourthly, how is the judgment or award of the court to be made effective? Of these four questions the one which more immediately concerns us is that of conferring compulsory jurisdiction upon the court, although that question is itself intimately tied up with the further question of the composition of the court and the law to be applied by it.

## ARBITRATION IN THE PAST

The question whether the international court should be given compulsory, or, to use the better term, obligatory, jurisdiction, can best be answered after a survey of the failures of international arbitration in the past. It is only by understanding how and why the optional arbitration hitherto recognized has failed, that we can realize both the difficulties involved in compulsory arbitration and the urgent need of meeting those difficulties frankly and directly. Now if we look over the record of arbitration in the past, not the kind of courts that have been set up but the extent of the obligation to arbitrate, we find that the great powers have never been willing to agree